IN THE IOWA SUPREME COURT

No. 16-0076

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA,

Plaintiff-Appellant,

v.

SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2 AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 19 and 26 and DRAINAGE DISTRICTS 64 and 105,

Defendants-Appellees.

CERTIFIED FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA REASSIGNED FROM HONORABLE MARK W. BENNETT TO HONORABLE LEONARD T. STRAND, DISTRICT COURT JUDGE, PRESIDING, ON FEB. 17, 2016

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Chicago Cent. & Pacific R.R. Co. v. Calhoun County Bd. of Supervisors, 816 N.W.2d 367 (Iowa 2012)

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State ex rel. Iowa Dep't of Nat. Res. v. Burlington Basket Co., 651 N.W.2d 29 (Iowa 2002)

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Hagenson v. United Tel. Co. of Iowa, 164 N.W.2d 853 (Iowa 1969)

Harrison-Pottawattamie Drainage Dist. No. 1 v. State, 156 N.W.2d 835 (1968)

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ROUTING STATEMENT

As a case presenting certified questions pursuant to Iowa Code Chapter 684A, this matter is properly heard by the Supreme Court.

STATEMENT OF THE CASE

On March 16, 2015, DMWW sued Defendant Drainage Districts in Sac, Buena Vista and Calhoun Counties ("the Drainage Districts" or "the Districts") seeking damages, among other things, for alleged nuisance (public, statutory and private), trespass, negligence, taking without just compensation in violation of Iowa's Constitution, and due process and equal protection violations. In response, the Drainage Districts noted this Court's repeated holdings that a "drainage district could not be subject to a money judgment in tort under any state of facts." *Fisher v. Dallas County*, 369 N.W.2d 426, 430 (Iowa 1985). The Districts noted this Court rejected virtually identical constitutional arguments in *Gard v. Little Sioux Intercounty Drainage Dist. of Monona & Harrison Counties*, 521 N.W.2d 696 (Iowa 1994). The Drainage Districts further noted Iowa's Code, the U.S. Supreme Court and lengthy lines of cases preclude DMWW's arguments. After the Drainage Districts sought summary judgment, the Federal District Court for Iowa's Northern District certified four questions to this Court seeking resolution. They are as follows:

Question 1

As a matter of Iowa law, does the doctrine of implied immunity of drainage districts as applied in cases such as *Fisher v. Dallas County*, 369 N.W.2d 426 (Iowa 1985), grant drainage districts unqualified immunity from all of the damage claims set forth in the Complaint (docket no. 2)?

Question 2

As a matter of Iowa law, does the doctrine of implied immunity grant drainage districts unqualified immunity from equitable remedies and claims, other than mandamus?

Question 3

As a matter of Iowa law, can the plaintiff assert protections afforded by the Iowa Constitution's Inalienable Rights, Due Process, Equal Protection, and Takings Clauses against drainage districts as alleged in the Complaint?

Question 4

As a matter of Iowa law, does the plaintiff have a property interest that may be subject of a claim under the Iowa Constitution's Takings Clause as alleged in the Complaint?

STATEMENT OF FACTS

When certifying questions, the certifying court is to state the "facts relevant to the questions certified." Iowa Code § 684A.3. Des Moines Water Works ("DMWW"), however, treats this case not as a referral of four questions under Chapter 684A, but as a new forum to consider summary judgment. Consistent with that view, DMWW presents a four page "statement of facts," including references to hypoxia in the Gulf of Mexico. (Br. at 16). DMWW apparently believes those purported facts should influence outcome of the questions presented. Rather than respond to DMWW's purported facts, the Drainage Districts note the only "facts" before the Court are those the federal court found and specified in referring this matter.

This Court is not a trial court charged with deciding facts or merely an alternative forum to address a pending motion like summary judgment or a motion to dismiss.[1] This is a proceeding pursuant to Iowa Code Chapter 684A to address specific, certified questions. As this Court routinely makes clear, "we restrict our answer to the facts provided by the certifying court when answering a certified question." *Willow Tree Invs., Inc. v. Wilhelm*,

[1] DMWW argues this case should be treated as a motion to dismiss for failure to state a claim. This is neither a summary judgment motion nor a motion to dismiss.

465 N.W.2d 849, 849 (Iowa 1991); *see Life Inv'rs Ins. Co. of Am. v. Estate of Corrado*, 838 N.W.2d 640, 643-44 (Iowa 2013); *Foster v. City of Council Bluffs*, 456 N.W.2d 1, 2 (Iowa 1990); *see also* Iowa Code § 684A.3. This Court "may decline to answer the certified questions if the court lacks specific findings of fact or finds the factual record to be unclear." *Life Inv'rs Ins. Co. of Am.*, 838 N.W.2d at 643-44.

DMWW suggests this court should take <u>its</u> factual allegations as true, rather than those actually found by the federal court. It then suggests that, although a factually driven "balancing of interests" may be necessary (Br. at 57), this "Court can provide guidance to the District Court on the record here." DMWW is incorrect. This Court is not deciding summary judgment. Nor does this Court provide advisory opinions—even on certified questions:

> As we construe the [certification] statute, it contemplates that our response *will be* "determinative of the cause"—and in fact if this were not so the statute would not satisfy constitutional requirements [of a justiciable controversy].... We cannot see that this can ever be so if the facts remain unresolved and in a hypothetical state. The Florida certification statute obviates this difficulty by permitting certification only by federal courts *at the appellate level*. At that level the facts will have been found and established. If we are to participate and yet not render purely advisory opinions, we think it will be incumbent upon us to respond to questions only when it is apparent from the certification itself that all material facts have been either agreed upon or found by the court and that the case is in such posture in all respects that our decision as to the applicable Maine law will in truth and in fact be "determinative of the cause" as the

> statute conferring jurisdiction upon us requires. Such is not the case here.

Eley v. Pizza Hut of Am., Inc., 500 N.W.2d 61, 63 (Iowa 1993) (quoting *In re Richards*, 223 A.2d 827, 833 (Me. 1966)). This Court "should not answer 'questions which admit of one answer under one set of circumstances and a different answer under another, neither of which is inconsistent with the certificate.'" *Life Inv'rs Ins. Co. of Am.*, 838 N.W.2d at 643-44 (quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 573 (1939)).

The Drainage Districts find it difficult *not* to respond to issues DMWW presents as undisputed because DMWW makes assertions that are not only unsupported, but that its own witnesses contradict. A proceeding to address certified questions, however, is not the place to resolve factual disputes or even determine what is disputed. The Federal District Court recognized just two undisputed facts:

> The two following facts, relevant to the parties' purely legal arguments, are undisputed: the plaintiff is a water utility organized and acting under Iowa Code Section 388; and the defendants are drainage districts under Iowa Code Chapter 468 and Article I, Section 18 of the Iowa Constitution.

Ruling at 4. The District Court explicitly did *not* find *any* other facts. Ruling at 4 ("[t]he following two sections are not intended to be findings of fact"). Thus, just two facts are before this Court. If this Court finds the two identified facts are insufficient to resolve the certified questions, then the

questions are not properly certified and should not be answered. *Life Inv'rs Ins. Co. of Am.*, 838 N.W.2d at 643-44.

ARGUMENT

A federal court may certify a question to this Court if:

> there are involved in a proceeding before [the federal court] questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of this state.

Iowa Code § 684A.1. This Court may decline to answer certified questions lacking specific findings of fact or where the factual record is unclear, *see Eley*, 500 N.W.2d at 63; when it is asked to provide an advisory opinion, *see Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997); or when a certified question does not decide the case, *see Life Inv'rs Ins. Co. of Am.*, 838 N.W.2d at 647. Absent some prior indication a doctrine is in doubt, "reconsideration of stare decisis is not a matter for us to decide via certified question." *Foley v. Argosy Gaming Co.*, 688 N.W.2d 244, 247 (Iowa 2004).

DMWW asks this Court to answer the certified questions for all the wrong reasons. If this Court answers the questions certified, it necessarily will either: (1) reaffirm case law recognizing drainage district immunity in tort and precluding equitable claims against drainage districts except through

mandamus; or (2) overrule existing precedent to provide an advisory opinion that drainage district may have a corporate existence for liability purposes under some hypothetical facts. Neither outcome is consistent with certification's purpose. A federal court must follow this Court's unambiguous precedent. *See, e.g., Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616, 624 fn. 9 (8th Cir. 2003). "The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else." *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir. 1976) (cited with approval in *Foley*, 688 N.W.2d at 247).[2]

"A litigant who wants an adventurous interpretation of state law should sue in state court . . . rather than ask [a federal court] to declare such an interpretation to be the law of [the state]." *Doe v. City of Chicago*, 360

[2] DMWW's constitutional arguments do not make certification appropriate. The Court's past drainage district cases make clear there are no exceptions to drainage district immunity, even in the face of constitutional challenges. *See, e.g., Fisher v. Dallas County*, 369 N.W.2d 426, 430 (Iowa 1985) ("[A] drainage district could not be subject to a money judgment in tort *under any state of facts*.") (emphasis added); *Board of Supervisors of Worth County v. District Court of Scott County*, 229 N.W. 711, 712 (Iowa 1930) ("There can be no judgment at law rendered against a drainage district *in any case*.") (emphasis added); *see also Gard v. Little Sioux Intercounty Drainage Dist. Of Monona & Harrison Counties*, 521 N.W.2d 696, 699 (Iowa 1994) (rejecting equal protection argument against drainage district immunity). Regardless of how DMWW frames its arguments, DMWW asks that this Court's precedent be overruled, which is an improper use of certification.

F.3d 667, 672 (7th Cir. 2004). "And it's not a proper alternative to proceeding in the first instance in state court to sue in federal court but ask that the suit be stayed to permit certifying the interpretive issue to the state court, thus asking that the suit be split between two courts." *Id.* DMWW's attempt to use certification as a "lifeline" to allow the federal court an avenue to not apply this Court's precedent should not be allowed. Declining to answer the certified questions will discourage forum-shopping in future cases and avoid excising the state district court from the litigation process.

An appeal requires addressing, as DMWW does, whether arguments are preserved for appeal. This is not an appeal. Instead, the federal district court certified four questions to be answered. The Drainage Districts noted the issues presented already were decided by over a century of precedent and referral was unnecessary. In referring questions to this Court, the federal court indicated that, "Although I agree with the defendants that the seven factor test I outlined [in] *Hagan* probably weighs against certification in this case, I am going to certify it anyway." Ruling at 25. The federal court acknowledged, if it did not certify questions, it "would have to reject" DMWW's arguments. Ruling at 24. Indeed, it would.

Assuming this Court can, and wishes to, answer the certified questions, the Districts will address them in the order the federal court

presented. The answer to each is as simple as this: DMWW appropriately may be required to sue a proper party rather than an improper party.

I. As A Matter Of Iowa Law, Does The Doctrine Of Implied Immunity Of Drainage Districts As Applied In Cases Such As Fisher V. Dallas County, 369 N.W.2d 426 (Iowa 1985), Grant Drainage Districts Unqualified Immunity From All Of The Damage Claims Set Forth In The Complaint (Docket No. 2)?

A. Drainage Districts Cannot Be "Subject To A Money Judgment In Tort Under Any State Of Facts."

For generations, this court has been clear. "[A] drainage district is not 'such a legal entity as is known to or recognized by law as a proper party to adversary proceedings.'" *Gard*, 521 N.W.2d at 699 (quoting *Gish v. Castner-Williams & Askland Drainage Dist.*, 113 N.W. 757, 757 (1907)). A "drainage district could not be subject to a money judgment in tort under any state of facts." *Fisher*, 369 N.W.2d at 430. "Iowa has never allowed tort claims for money damages to be made against a drainage district." *Gard*, 521 N.W.2d at 698. "Our more recent cases have continued to recognize that there are 'limited circumstances in which a drainage district is subject to suit' and that the legislature has 'sharply restrict[ed] the circumstances in which the affairs of a drainage district are subject to judicial action.'" *Chicago Cent. & Pacific R.R. Co. v. Calhoun County Bd. of Super.*, 816 N.W.2d 367, 374 (Iowa 2012). In response, DMWW argues "[A] drainage district is ~~not~~ 'such a legal entity as is ... a proper party to adversary proceedings,'" *Gard*, 521 N.W.2d at 699, a "drainage district could ~~not~~ be subject to a money judgment in tort ... ," *Fisher*, 369 N.W.2d at 430, and

"Iowa ~~has never~~ [should] allow~~ed~~ tort claims for money damages to be made against a drainage district." *Gard*, 521 N.W.2d at 698. There is no basis to read all the negatives out of the law.

Because DMWW's position cannot be reconciled with this Court's rulings, its improper attempt to use certified questions to alter Iowa law should be rejected.

B. Drainage Districts' Existence Is Very Limited.

To pursue what it perceived as a public benefit, Iowa's Legislature established a vehicle, in drainage districts, to allow landowners to levy upon themselves to accomplish this public good. Iowa Code § 468.2(1) and (2). The federal district court accurately described the law regarding drainage districts' creation and operation:

> Drainage districts were formed to allow wetlands to be turned into agricultural lands. The purpose of drainage districts in Iowa can be traced back to the late 1800s and early 1900s. *See* Swamp Lands Act of 1850; *Hatch, Holbrook & Co. v. Pottawattamie Co.*, 43 Iowa 442 (1876); Thirteenth Amendment to the Iowa Constitution of 1908. There were vast areas of flat land that were unable to be farmed due to inadequate drainage. Iowa Code Chapter 468 and Iowa Constitution Article I, § 18 established drainage districts as they exist under Iowa law currently. Drainage districts are a funding mechanism property owners establish to levy for drainage improvements. *Fisher v. Dallas County*, 369 N.W.2d 426, 428-29 (Iowa 1985). For a drainage district to be established, at least two land owners must petition for its creation. IOWA CODE § 468.6. "The right of a landowner to place tiles in swales or ditches to carry the water from ponds upon and onto lower lands ... is necessary [ ] in order that low and swampy

> lands may be reclaimed, and a denial thereof would be productive of incalculable mischief." *Dorr v. Simmerson*, 103 N.W. 806, 807 (1905). The affairs of drainage districts are managed by the county board of supervisors in a representative capacity. *See* IOWA CODE §§ 468.37, .89, .231, .232, .617. If a repair exceeds $50,000, a hearing is required to determine advisability and appeal is allowed. IOWA CODE § 468.126(1)(c). Similarly, improvements exceeding a certain amount can be stopped through a process called remonstrance. IOWA CODE § 468.126(4)(e).

Ruling Certifying Questions at 7-8. In other words, drainage districts are instrumentalities the Legislature created to fulfill its will that landowners be allowed to drain land to make it productive. Because their authority is so limited, a drainage district is not "a proper party to adversary proceedings.'" *Gard*, 521 N.W.2d at 699.

Drainage districts "have only such power as the legislature grants them . . . ." *Reed v. Muscatine-Louisa Drainage Dist. No. 13*, 263 N.W.2d 548, 551 (Iowa 1978).[3] They may be overridden on any improvement through the remonstrance process. Iowa Code § 468.126(4)(e). "Our cases

[3] Drainage districts do not have authority to tell landowners what nutrients to use on their land, to direct landowners' management of their properties, or to control how much rain falls from the sky. Iowa Code § 468.1 *et seq.* Much like the builder of a highway does not control what travels over that highway, drainage districts do not control what travels through drainage tiles. They simply fulfill limited, legislatively-mandated functions as specified in Iowa Code Chapter 468 as landowners approve. Drainage Districts only may implement improvements that "expand, enlarge, or otherwise increase the capacity of any existing ditch, drain, or other facility above that for which it was designed." Iowa Code § 468.126(4).

concerning the legal status of drainage districts have consistently noted the limited nature of their existence. They have only such powers as the statutes provide." *Fisher*, 369 N.W.2d at 429. Drainage districts' powers are so circumscribed and limited that they only may be sued to perform delegated duties. *Chicago Cent.*, 816 N.W.2d at 374. As a result, "both the statutes and our cases decided thereunder indicate that the limited nature of a drainage district's existence does not permit its liability in tort." *Fisher*, 369 N.W.2d at 430. "The reason for this, as we have stated above, is that the special and limited powers and duties conferred by the Iowa Constitution and the statutes do not include tort liability for money damages." *Id.*

1. Nothing Changed To Alter Longstanding Law Reaffirmed in 2012.

In response to Iowa's longstanding law that drainage districts are limited to doing as the Legislature directed and are not proper parties to litigation, DMWW first argues the legislative presumption of drainage's public health benefits is no longer valid and, thus, inexplicably, their lack of corporate existence for liability also somehow no longer exists.

DMWW's argument has multiple failings. It is inconsistent with the Code's language and inaccurately recites the rationale for drainage districts' lack of corporate existence. It also seeks to overturn prior case law through a certified question absent this Court previously indicating prior holdings

were in doubt. *Foley*, 688 N.W.2d at 247-48 (holding 684A cannot interfere with *stare decisis* absent a prior indication a holding was in doubt). Far from indicating its prior decisions were in doubt, this Court just reaffirmed them in 2012. *Chicago Cent.*, 816 N.W.2d at 374.

a. Public Health Merely Is One Of Three Bases To Create A Drainage District.

First, assuming for the moment DMWW's claim makes sense and is accurate, Iowa Code Section 468.1 addressing "public health" provides "jurisdiction to establish" drainage districts. *Hatcher v. Board of Supervisors of Greene County*, 145 N.W. 12, 14 (1914) (noting this standard is for landowners to create districts to levy on themselves). Nobody objected many decades ago when these drainage districts were established. Once drainage districts are created, the drainage district trustees' duty becomes to ensure the system continues to flow unobstructed. Iowa Code § 468.126(1) ("the board shall keep the improvement in repair as provided in this section"). The word "shall" creates a duty. Iowa Code § 4.1(30)(a).

> Once a drainage improvement has been constructed, the board, acting as trustee for the drainage district, has a duty to "keep the improvement in repair." Iowa Code § 468.126(1). "[K]eeping a drainage ditch in repair [is] a mandatory statutory duty of the Board of Supervisors...." *Welch v. Borland*, 246 Iowa 119, 121, 66 N.W.2d 866, 868 (1954). If the board fails to perform the required repairs, then a mandamus action is the appropriate remedy for a complaining party. *See Voogd*, 188 N.W.2d at 391 ("A drain once completed is under the supervision of the

> supervisors, and they can be compelled by mandamus to maintain it and keep it in repair."); *374 *Welch*, 246 Iowa at 121–22, 66 N.W.2d at 868; *see also Wise*, 242 Iowa at 874–75, 48 N.W.2d at 249.

Chicago Cent., 816 N.W.2d at 373-74. A repair is something to "restore or maintain a drainage or levee improvement in its original efficiency or capacity" or "to prolong its useful life." Iowa Code § 468.126(1)(a).

Further, even ignoring that Section 468.1 merely provides "[j]urisdiction to establish" a drainage district, the Code provides *three* presumptions to support creating drainage districts: health, convenience *or* welfare. Thus, even if this case challenged a drainage district's creation, two additional undisputed bases remain to create them beyond health benefits. *Hatcher*, 145 N.W. at 14 (holding "if any one of the reasons given is the essential purpose of the plan" a district is appropriate). Neither convenience nor welfare is argued to apply any less today than when the Legislature created jurisdiction for establishing drainage districts.[4] To the extent DMWW argues there would be no basis to create new drainage districts today, they are all wet. Certainly, nothing in their argument provides any basis to eliminate existing drainage districts or to impose tort liability—even if DMWW's claims are accepted as true.

[4] Nothing is offered in the record regarding the meaning of "health" other than food production, which also remains equally applicable today.

b. If DMWW Wanted To Change The Law, It Needed To Persuade The Legislature.

Second, the Legislature was within its rights to conclude food production benefits public health. Even ignoring overwhelming health, convenience and welfare benefits from food production, if DMWW disagrees with the Legislature's conclusion, its recourse is to ask *the Legislature* to change the law. *State v. Monroe*, 236 N.W.2d 24, 36 (Iowa 1975) ("If changes in a law are desirable from a standpoint of policy or mere practicality, it is for the legislature to enact them, not for the court to incorporate them by interpretation."). Simply put, *nothing changed* about the fact drainage districts are so limited in their existence as to render them merely vehicles to effectuate the legislature's intent and, thus, not proper parties to litigation. A party cannot argue that, because cars became faster and safer, legislatively set speed limits no longer exist. Nor was prohibition reinstated after alcohol's dangers became clearer. Because nothing about the Code changed, drainage districts have not acquired new existence for litigation purposes they lacked 3 ½ years ago when this Court reiterated its longstanding holdings. *Chicago Cent.*, 816 N.W.2d at 374; *see Foley*, 688 N.W.2d at 247-48 (finding a certified question an improper vehicle to overturn longstanding law).

c. Drainage Districts' Lack Of Corporate Existence For Liability Was Never Based On Public Health.

Third, although DMWW claims drainage districts' absence of corporate existence for liability purposes somehow is based on the Legislature presuming drainage's health benefits, DMWW's premise is false. Never, in more than a century of precedent, was it said drainage districts may not be sued because they are "conducive to the public health." DMWW cites no cases to the contrary.[5] After all, hospitals and doctors are conducive to public health, but may be sued. Instead, "[t]he reason for [drainage districts not being proper parties to suit], as we have stated above, is that the special and limited powers and duties conferred by the Iowa Constitution and the statutes do not include tort liability for money damages." *Fisher*, 369 N.W.2d at 430. "It has no corporate existence for that purpose." *Id*. at 429; *Chicago Cent.*, 816 N.W.2d at 374. A "[d]rainage

[5] To support its argument, DMWW compares the holding in *Miller v. Monona County*, 294 N.W. 308 (Iowa 1940) with *Vogt v. City of Grinnell*, 110 N.W. 603 (Iowa 1907), to conclude the reason why the city was held liable in *Vogt* and the drainage district was not in *Miller* was because the court drew a line at pollution. DMWW ignores the more obvious reason for the different holdings supported by the opinions' language; *Miller* involved drainage districts with limited existence and *Vogt* involved a city with less limited existence for suit—just as *Fisher* explained when it noted municipalities always had been subject to some liability, while drainage districts never were. 369 N.W.2d at 430. DMWW merely highlights the distinction *Gard* and *Fisher* emphasized.

district ... is not a person nor a corporation. It is nothing more than a definite body or district of land constituting an improvement district." *Clary v. Woodbury County*, 113 N.W. 330, 332 (Iowa 1907). Drainage districts are not empowered to mandate cover crops or whatever remedies DMWW suggests for nitrate reduction and landowners may override trustee decisions for improvements using the remonstrance process. Drainage districts are merely vehicles to effectuate legislative intent to allow land to be made productive.

Perceived health benefits never prevented drainage districts from being proper parties for tort suits. Their limited nature *did*—continually since 1907. *Clary*, 113 N.W. at 332; *see Board of Supervisors of Worth County*, 229 N.W. at 712; *Maben v. Olson*, 175 N.W. 512, 516 (Iowa 1919); *Gish*, 113 N.W. at 757. That limited existence has not changed.[6] Absent the Code or Constitution changing, the law based on it likewise remains the same. *Gard*, 521 N.W.2d at 698 (making clear a drainage district's nature

[6] DMWW cites *State Ex rel. Iowa Employment Sec. Comm'n v. Des Moines County*, 149 N.W.2d 288, 291 (Iowa 1967), to challenge drainage districts' limited existence. Nothing in that case addressed whether drainage districts can be liable for damages. Instead, the case simply held a mandamus action may be brought to compel a drainage district to perform a statutory duty to collect taxes. Evidencing the case's limitations, this Court repeatedly reaffirmed that drainage districts cannot be liable for damages after 1967 and specifically rejected the argument that the holding in *State Ex rel. Iowa Employment Sec. Comm'n* changed this rule in *Gard*, 521 N.W.2d at 698.

does not change when the Code remains the same). Drainage districts are not proper parties because they remain creatures of very limited existence and are not "juristic entities" except for mandamus suits to compel fulfillment of their limited duties. *Fisher*, 369 N.W.2d at 429. Creating a fictitious explanation for this Court's rulings, only then to try to strike it down, does nothing to address, or overcome, the real reason drainage districts cannot be sued in tort.

2. Home Rule Does Not Alter Drainage Districts' Limited Existence.

DMWW argues county home rule somehow expanded drainage districts' powers to make their existence no longer so limited and to make them somehow proper parties to suit. Iowa Code Chapter 468 governs and restricts drainage districts. County home rule did not alter Chapter 468 in any way.[7] DMWW does not identify what drainage districts now may do

[7] DMWW cites a 1980 Attorney General Opinion to argue drainage districts somehow now may be liable. 1980 Iowa Op. Att'y Gen. 631 (1980). First, the opinion does not address liability and most assuredly could not overrule years of Supreme Court precedent. Second, this Court repeatedly held otherwise *since 1980*. Third, even if accurate, all the opinion suggested was counties could exert home rule over drainage district farmers regarding how they till land. It did not say *drainage districts* could legislate or be liable. After all, if a drainage district tried to legislate, who has priority between the county and the district? If DMWW thinks the counties can and should pass ordinances regulating drainage districts, its gripe is with them. DMWW, however, cannot insist, though litigation or otherwise, that counties exercise such legislative prerogative, even if it exists, in DMWW's favor.

that they could not before the 1978 home rule amendment. Drainage districts are still subject to the very same Code provisions and still face the very same authority limitations that existed before 1978. If landowners do not like a particular proposal, they still can challenge it. If a drainage district does not fulfill its duties, it still can be compelled to do so through mandamus. Indeed, if DMWW is to be believed, the only drainage district power that expanded is they somehow now have the power to be sued in tort by Des Moines Water Works.

DMWW also overlooks that drainage districts are *state* legislative creations. Iowa Code Ch. 468. Home rule never gave counties or municipalities power to override the state legislative determination that drainage districts cannot be liable. *See Worth County Friends of Agriculture v. Worth County*, 688 N.W.2d 257, 261-62 (Iowa 2004) ("[Counties] may only exercise [home rule] powers if not inconsistent with the laws of the

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Northwood Properties Co. v. Perkins, 39 N.W.2d 25, 27 (Mich. 1949) ("While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another. *** The court erred in seeking to compel the defendant mayor and city commission members to amend the ordinance."); *see also Hansen v. Haugh*, 149 N.W.2d 169, 172 (Iowa 1967) ("It is not the function of courts to legislate and they are constitutionally prohibited from doing so. Article III, section 1, Iowa Constitution.").

general assembly") (quoting Iowa code § 331.301(1); *Goodell v. Humboldt County*, 575 N.W.2d 486, 592 (Iowa 1998) ("[C]ounties have the power 'to determine their local affairs and government,' but only to the extent those determinations are 'not inconsistent with the laws of the general assembly.'") (quoting Iowa Const. art. III, § 39A). Counties cannot override the statutory limits in Chapter 468. *Fisher*, 369 N.W.2d at 430 ("the statutes … do[] not permit its liability in tort."). Nor is there any indication they tried.

Not surprisingly, drainage districts' limited existence continues to be recognized after county home rule, including in 1980, 1985, 1986, 1994 and 2012. *Chicago Cent.*, 816 N.W.2d at 374; *Gard*, 521 N.W.2d at 698-99; *National Properties Corp. v. Polk County*, 386 N.W.2d 98, 107 (Iowa 1986); *Fisher*, 369 N.W.2d at 430; *Holler v. Board Sup'rs of Pocahontas County*, 304 N.W.2d 441, 442 (Iowa 1980). The *Gard* plaintiff, much like DMWW, argued drainage districts should be likened to municipalities and, because the Tort Claims Act waived sovereign immunity for municipalities, it also made drainage districts proper parties. Rejecting the argument, this Court explained drainage districts are ***not*** municipalities and always have been different from counties and municipalities in the limitations on their ability

to be sued. *Fisher*, 369 N.W.2d at 430. *Gard* and *Fisher* reiterated this difference *after* home rule was implemented.

DMWW's attempt to again argue drainage districts should be liable because they are like counties and municipalities, when this Court found they are ***un***like counties or municipalities, is contrary to Iowa law.

3. DMWW's Argument That This Court Should Overrule A Rule It Created From Whole Cloth Neither Accurately Recognizes The Rule's Legislative Origin Nor The Proper Use Of Certified Questions.

DMWW finally argues what it calls drainage district's "unqualified immunity" is a court created doctrine this Court should overrule despite a century of precedent just reiterated in 2012. First, certified questions are not a proper vehicle to overrule well established law. *Foley*, 688 N.W.2d at 247-48. Second, this Court made clear its view of a drainage district's limited existence reflects *the* ***Legislature's*** will: "the ***legislature*** has 'sharply restrict[ed] the circumstances in which the affairs of a drainage district are subject to judicial action.'" *Chicago Cent.*, 816 N.W.2d at 374 (emphasis added) (quoting *Fisher*, 369 N.W.2d at 429). This Court made clear "both the statutes and our cases decided thereunder indicate that the limited nature of a drainage district's existence does not permit its liability in tort." *Fisher*, 369 N.W.2d at 430.

Interpreting legislative intent is *not* creating doctrine from whole cloth as DMWW suggests. *Manitowoc Eng'g Co. Salaried Employee's Deferred Profit Sharing Plan v. Powalisz*, No. 85-C-534, 1987 WL 49391, at *9 (E.D. Wis. Jan. 20, 1987) ("legislative intent is not a judicially-created fiction"). When there has been consistent judicial interpretation for over 100 years, the Legislature's silence speaks volumes:

> Overall, we think our legislature would be quite surprised to learn if we decided to reverse course and take a different position under the guise of statutory interpretation. We did our job twenty-seven years ago and will leave it for the legislature to take any different approach. The specific arguments presented by the plaintiffs are not so powerful or obvious that they plainly undermine our prior line of cases.

Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678, 688 (Iowa 2013); *see Doe v. New London Cmty. Sch. Dist.*, 848 N.W.2d 347, 355-56 (Iowa 2014), *reh'g denied* (July 17, 2014); *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 813 (Iowa 2011) (holding stare decisis has greater importance when "'the construction placed on a statute by previous decisions has been long acquiesced in by the legislature.'"). In fact, this Court made clear the Legislature has *not* challenged its interpretation of drainage districts' limited statutory existence and, thus, *stare decisis* prevents doing so now. *Chicago Cent.*, 816 N.W.2d at 374; *Gard*, 521 N.W.2d at 698.

To rule for DMWW, therefore, this Court not only must overrule 109 years of precedent, but also its own repeated rulings that *stare decisis* precludes overruling that same 109 years of precedent—in a proceeding expressly designed *not* to overrule 109 years of precedent. *Foley*, 688 N.W.2d at 247-48.[8]

II. As A Matter Of Iowa Law, Does The Doctrine Of Implied Immunity Grant Drainage Districts Unqualified Immunity From Equitable Remedies And Claims, Other Than Mandamus?

DMWW takes the position it should be able to seek equitable relief rather than being limited to mandamus. In doing so, DMWW appears to misunderstand mandamus's nature. Mandamus ***is*** equitable relief. Iowa

[8] Evidencing DMWWs attempt to use Chapter 684A to overrule Iowa law rather than apply it, DMWW relies on other jurisdictions' cases and Iowa's abolishment of other immunities to ask this Court to overturn a century of Iowa precedent. Not only is DMWW's request to change Iowa law through certified questions inappropriate, but its reliance on other jurisdictions' cases based on different statutes is misplaced. *See Kearney v. Almann*, 264 N.W.2d 768, 770-71 (Iowa 1978) ("The difference in statutes makes the Nebraska cases inapposite."); *Maben*, 175 N.W. at 516. Indeed, some cited cases are based on statutes expressly allowing suits against drainage districts, *see, e.g.* 70 Ill. Comp. Stat. Ann. 605/3-24; La. Rev. Stat. Ann. § 38:1614, and some found the drainage district at issue immune from liability. *See, e.g. Gerbers, Ltd. v. Wells County Drainage Bd.*, 608 N.E.2d 997, 1000 (Ind. Ct. App. 1993); *Landview Landscaping, Inc. v. Minnehaha Creek Watershed Dist.*, 569 N.W.2d 237, 240-41 (Minn. Ct. App. 1997). Nor does abolishment of other immunities abolish this one based on a different statute. *Banghart v. Meredith*, 294 N.W. 918, 920 (Iowa 1940) (finding cases dealing with different statutes, rules and factual situations inapplicable).

Code § 661.3. *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992) ("Mandamus is an equitable action."); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471, 474 (Iowa 1982) (same). "Mandamus is brought to compel an inferior board to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station." *Welch v. Borland*, 66 N.W.2d 866, 868 (Iowa 1954); *see* Iowa Code § 661.1. If drainage districts have a duty, mandamus ***is*** the proper equitable vehicle to compel its performance. *Hardin County Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R. Co.*, 826 N.W.2d 507, 511 (Iowa 2013); *Chicago Cent.*, 816 N.W.2d at 374. The real issue cannot be whether equitable relief is available. It *is* available through mandamus if the Drainage Districts have a duty. Thus, DMWW must seek either: (a) equitable relief compelling drainage districts do something that is ***not*** a duty, or (b) to avoid the forum and presumptions specified for mandamus. Neither is proper.

It cannot be overstated that drainage districts "have only such power as the legislature grants them ...." *Reed*, 263 N.W.2d at 551. They perform duties Iowa's Legislature vested in them. "Suits against drainage districts 'have been allowed ***only*** to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of a drainage

district.'" *Chicago Cent.*, 816 N.W.2d at 378 (quoting *Fisher*, 369 N.W.2d at 429 ("Suits have been allowed only to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of a drainage district.")) (emphasis added). This is mandamus's definition. Iowa Code § 661.5; *State ex rel. Johnson v. Allen*, 569 N.W.2d 143, 148 (Iowa 1997); *Reed v. Gaylord*, 216 N.W.2d 327, 331 (Iowa 1974). If a duty does not exist, no cause of action lies. *Valentine v. Indep. Sch. Dist. of Casey*, 183 N.W. 434, 436 (Iowa 1921) ("If the defendant school board had no legal duty to perform in the premises, then mandamus does not lie."); *see Chicago Cent.*, 816 N.W.2d at 378 ("Each such case has been based on a statutory provision concerning the powers or duties of a drainage district."). Trying to sidestep mandamus to compel performance of a duty that does not exist must fail.

Mandamus actions also have restrictions. For example, mandamus lies "only to enforce legal rights that are clear and certain." *Stafford v. Valley Cmty. Sch. Dist.*, 298 N.W.2d 307, 309 (Iowa 1980); *Steinlage v. City of New Hampton*, 567 N.W.2d 438, 441 (Iowa Ct. App. 1997). Slapping a different name on a cause of action to avoid deferential review is inappropriate. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-cv-0001-8,

2006 WL 3359448, at *11 (N.D. Ohio Nov. 17, 2006); *Eavzan v. Polo Ralph Lauren Corp.*, 40 F. Supp. 2d 147, 152 (S.D.N.Y. 1998) (dismissing prima facie tort claim that attempted to "circumvent the obstacles to [a] malicious prosecution claim"). Further, mandamus actions cannot, as here, be combined with other causes of action. Iowa Code § 661.12. Such actions also must be brought in the county where the official sought to be bound resides. *Board of Supervisors of Worth County*, 229 N.W. at 713 ("The venue of the action against the public officials in their official capacity must be in the county of the residence of such officials."); Iowa Code § 616.3(2). Again, trying to avoid legal requirements for one's cause of action by calling it something else is inappropriate.

DMWW cites several cases trying to show equitable remedies may be obtained against drainage districts. Three of DMWW's cases addressing equitable relief were suits to enforce duties. *See Voogd v. Joint Drainage Dist. No. 3-11*, 188 N.W.2d 387 (Iowa 1971) (allowing suit only to challenge validity of assessment under levy power the Iowa Code granted); *Reed*, 263 N.W.2d at 551 (allowing challenge to drainage district's property sale under the power to sell real estate Iowa's Code granted); *Busch v. Joint Drainage Dist. No. 49-79, Winnebago & Hancock Counties*, 198 N.W. 789, 797-98 (Iowa 1924) (rejecting challenge to drainage districts' drainage

improvements contract under power Iowa's Code granted). One case did not involve equitable remedies at all, but rather addressed reconciling two state statutes to resolve jurisdiction. *Polk County Drainage Dist. Four v. Iowa Natural Resources Council*, 377 N.W.2d 236 (Iowa 1985). The last case held equitable action ***in***appropriate. *Sisson v. Board of Supervisors of Buena Vista County*, 104 N.W. 454, 463 (Iowa 1905) ("It is our conclusion upon the whole case that there is made to appear no violation of the Constitution in any of the respects contended for. And from this it follows that the injunctional decree as entered by the court below should not have been granted...."). It is not persuasive to argue that, because a case was thrown out on a different basis than DMWW presents, DMWW's argument becomes valid.

This Court clearly had no confusion about the law when it held *stare decisis* precluded altering the fact mandamus is the appropriate remedy against a drainage district for failing to perform a duty. *Chicago Cent.*, 816 N.W.2d at 374 ("The legislature has not responded to our interpretation of this aspect of the drainage district statutes, indicating its tacit acceptance of mandamus as the appropriate remedy for board inaction.").[9]

[9] DMWW also argues the law somehow differs from what this Court stated because a nuisance statute exists. This Court already held drainage districts'

III. As A Matter Of Iowa Law, Can The Plaintiff Assert Protections Afforded By The Iowa Constitution's Inalienable Rights, Due Process, Equal Protection, And Takings Clauses Against Drainage Districts As Alleged In The Complaint?

In its third question, the federal district court asks whether DMWW can claim a drainage district violated its inalienable rights, deprived it of due process or equal protection, or committed a taking. It is important to understand what is and is not before this Court. For example, DMWW tries to make this a case (1) about whether it is remediless, and (2) about clean drinking water. Neither issue is before this Court.

Drainage districts are not "a proper party to adversary proceedings." *Gard*, 521 N.W.2d at 699. DMWW repeatedly asserts it is remediless if it cannot sue an improper party. Whether DMWW may sue *anyone* or has constitutional rights under any circumstances, however, is *not* before this court. *See Gard*, 521 N.W.2d at 697 (upholding dismissing drainage districts from among multiple defendants because drainage districts were not a proper party). Before the Court is whether DMWW may sue entities that are not proper parties because they lack power to do anything beyond what

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limited existence precludes drainage districts being proper parties to suit under Iowa's nuisance statute. *Miller*, 294 N.W. at 310 ("The nature of these drainage districts makes inapplicable many of the citations upon which appellees rely. Thus these sections are cited: 12395, Code 1935 (defining what constitutes a nuisance)…").

they are compelled to do—including remedy any ills DMWW alleges. In fact, courts routinely find it improper to sue parties lacking ability to redress issues. *See Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (injunction against state official is "utterly meaningless" where official against whom the injunction is granted lacks the power to redress the asserted injuries); *McDaniel v. Board of Educ. of City of Chicago*, 956 F. Supp. 2d 887, 894 (N.D. Ill. 2013) ("In effect, Plaintiffs ask this Court to order the City to act in a manner that Illinois law prohibits; this the Court will not do.")

DMWW also dramatically suggests "the need for clean water should take precedence over the convenience of unrestrained pollution by drainage districts." Br. at 50. This case is about neither providing clean drinking water nor alleged health risks to Des Moines residents. The Safe Drinking Water Act placed the burden to treat raw source water on DMWW. 42 U.S.C. § 300f *et seq*. Thus, by law, drinking water will be clean. This case merely involves DMWW's effort to revise the Legislature's allocation among the State's own subordinate entities of the less than a penny a day cost to DMWW's customers to treat raw water for nitrate.

A. Strict Scrutiny Does Not Apply To DMWW's Claims.

Trying to challenge the doctrine barring its claims, DMWW claims not allowing it to sue improper parties somehow denies it fundamental rights and requires strict scrutiny. Absent are cases supporting DMWW's position. In fact, strict scrutiny is unwarranted when challenging a state's power to apportion rights among *its own governmental entities*. *See City of Herriman v. Bell*, 590 F.3d 1176, 1191 (10th Cir. 2010) (noting a state's discretion in structuring its political subdivisions prevents strict scrutiny); *Green v. City of Tucson*, 340 F.3d 891, 902 (9th Cir. 2003) (finding strict scrutiny unwarranted where challenged action fell within the state's "extraordinarily wide latitude to create various types of political subdivisions and confer authority upon them").

DMWW asks this Court to ignore that it already found the Legislature's limitations on drainage district's existence are evaluated under a rational basis test. *Gard*, 521 N.W.2d at 699.[10] Even though *Gard*

[10] DMWW argues *Racing Assoc. of Cent. Ia. v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (RACI), changed this Court's rational basis review, thus calling into question the *Gard* decision. Not only does *RACI*'s rational basis review rely on cases *predating Gard*, thereby belying any changed standard, but this Court recognized traditional rational basis review's continued validity: "*RACI* has not been the death knell for traditional rational basis review. Since *RACI* was decided, we have continued to uphold legislative classifications based on judgment the legislature could have made, without requiring evidence or "proof" in either a traditional or nontraditional sense."

involved alleged taking of a life, presumably a more fundamental "right" than DMWW's challenge to the Legislature's apportionment of costs to treat water among its subordinate entities, this Court held "we agree ... the rational basis test is applicable." *Id.* Not only did *Gard* find the rational basis test appropriate, it held there *was* a rational basis for the Legislature's distinction. *Id.* Indeed, it is hardly unusual to prevent entities lacking power to address concerns from being liable for things out of their control.

B. Neither This Court Nor The Legislature Violated The Constitution.

DMWW is not the first to challenge the constitutionality of drainage districts' limited existence rendering them improper parties. It is virtually a tautology, however, that conduct "the Constitution of the state expressly authorized" cannot violate the state's Constitution. Iowa's Constitution, in fact, provides for drainage districts:

> If the Constitution of the state expressly authorized the Legislature to give power to boards of supervisors to do what has just been described, and declared that the boards on such authority might do this even if thereby lower lands were overflowed, then, whatever might be said, it could not be that the Legislature had authorized doing, and that a board of supervisors was about to do, something violative of the Iowa Constitution. If the Constitution of the state expressly

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King v. State, 818 N.W.2d 1, 30 (Iowa 2012). Nothing suggests *RACI* overruled *Gard*. Indeed, *Gard* continues to be cited after *RACI*. *Chicago Cent.*, 816 N.W.2d at 374.

> empowered boards of supervisors to do certain things with reference to drainage products, and expressly stated that these things might be done no matter what the consequences to lower lands would be, the doing of what the defendant board is doing would, whatever it might be, not lack for sanction by the Constitution.
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> So far as exercise of power violative of the Iowa Constitution is concerned, if that instrument permitted boards of supervisors to do what these defendants propose to do, without providing any remedy for lower landowners or any compensation for them, the act of the board would still not be violative of the Iowa Constitution.

Maben, 175 N.W. at 513-14. "The drainage district is a special creation of the legislature and it requires no argument to sustain the proposition that it cannot create a nuisance while operating within the ambit of powers constitutionally delegated. **No constitutional question is here involved.**" *Miller*, 294 N.W. at 311 (emphasis added).

Like DMWW, the *Gard* plaintiff argued there was no rational basis for drainage districts not being liable when municipalities may be. 521 N.W.2d 696. This Court's response was clear:

> We believe there is a legitimate governmental purpose in permitting tort claims against municipalities under the provisions of chapter 613A but not permitting tort claims against a drainage district. Although municipalities are generally considered legal entities, in Iowa a drainage district is not "such a legal entity as is known to or recognized by law as a proper party to adversary proceedings." *Gish v. Castner-Williams & Askland Drainage Dist.*, 136 Iowa 155, 157, 113 N.W. 757, 757 (1907). Suits have been allowed against a

> drainage district "only to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of a drainage district." *Fisher*, 369 N.W.2d at 429. **Because of the limited nature of a drainage district's purposes and power, there is a rational basis for the classification.**

Id. at 699 (emphasis added). In other words, drainage districts are merely a funding mechanism to accomplish a legislative goal. Treating them differently than entities with greater rights and powers is rational and constitutional.[11] Nor does the fact a nuisance claim is brought alter the outcome. *Miller*, 294 N.W. at 311 (holding, with regard to nuisance claim, "No constitutional question is here involved.").[12]

Before one even considers other arguments, the rights alleged simply are not violated. Equal protection does not apply, nothing was taken, and no

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[11] It makes no sense to claim "home rule" somehow alters this. If anything, "home rule" merely enhanced the difference between counties/municipalities and drainage districts because counties/municipalities gained greater autonomy while drainage districts are as limited as ever. Further, *Gard* was decided *after* home rule was in place.

[12] Just as DMWW may not complain that the government's apportionment of rights to a state asset between it and the Districts violates the Equal Protection and Due Process Clause, it may not be heard to complain the government's apportionment of a state asset violates the Inalienable Rights Clause. *See Charles Hewitt & Sons Co. v. Keller*, 275 N.W. 94, 95 (Iowa 1937). DMWW's reliance on *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), is misplaced. *Gacke* involved private individuals as opposed to two governmentally created entities. Further, unlike the present case, no state asset was at issue in *Gacke*.

process is due when the state apportions respective rights and responsibilities among its subordinate, state-created entities. *City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 364 (S.D.N.Y. 2000).

1. One Legislatively Created Entity Cannot Properly Complain That The Legislature Violated Its Rights In The Manner In Which It Apportioned Rights With Another Legislatively Created Entity.

Iowa's Legislature may apportion rights and liabilities as it sees fit among its subordinate entities, *particularly as to state assets*. Doing so is *not* unconstitutional. "The Due Process and Equal Protection Clauses 'have not been interpreted as limitations on the internal political organization of a state.'" *City of New Rochelle*, 111 F. Supp. 2d at 364 (quoting *S. Macomb Disposal Auth. v. Washinton Tp.*, 790 F.2d 500, 505 (6th Cir. 1986)); *see Rogers v. Brockette*, 588 F.2d 1057, 1069 (5th Cir. 1979).

> Regulation of the flow of streams by the construction and maintenance of reservoirs is a matter of State concern in the interest of public health, safety and welfare.
>
> A regulating district charged with authority to carry out the public purpose is an agency of the State depending for its existence and performing its functions subject to the control and direction of the State. The number and nature of its powers are within the State's absolute discretion and any alteration, impairment or destruction of those powers by the Legislature presents no question of constitutionality.

> It has long been settled by Federal decisions that such powers are not protected by the due process clause of the Fourteenth Amendment to the Federal Constitution.
>
> The courts of this State from very early times have consistently applied the Federal rule in holding that political power conferred by the Legislature confers no vested right as against the government itself. It is on the theory that the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good. How long it shall exist or how it may be modified or altered belongs exclusively to the people to determine.

Black River Regulating Dist. v. Adirondack League Club, 121 N.E.2d 428, 432-33 (N.Y. 1954) (internal citations omitted).

Both drainage districts and water utilities are State creations. Those are the only undisputed facts the federal district court recognized in certifying questions to this Court. Ruling at 4. Iowa Code Chapter 468 creates drainage districts. Iowa Code Chapter 388 creates water works. Legislatively created entities exist at the Legislature's sufferance and it has every right to apportion relative rights between its subordinate entities. A governmentally created entity cannot complain the government unfairly established its rights vis a vis another governmentally created entity—***particularly*** as to state assets.

> We have held definitely that a school corporation cannot challenge the constitutionality of a legislative act. *Waddell v. Board of Directors*, 190 Iowa 400, 175 N.W. 65. We have held also indirectly that a county is under the same disability.

> *McSurely v. McGrew*, 140 Iowa 163, 118 N.W. 415, 132 Am.St.Rep. 248. And later we have held directly to such effect. *Iowa Life Ins. Co. v. Board of Supervisors*, 190 Iowa 777, 180 N.W. 721. These authorities are quite conclusive against the plaintiff's capacity to challenge this legislation.

Keller, 275 N.W. at 95.

In *McSurely v. McGrew*, 118 N.W. 415 (Iowa 1908), the plaintiff complained it violated our Constitution that the defendant was granted "special immunity not given to all others in the same situation." *Id.* at 417. This Court noted it was not faced with a suit by a private party and made clear the Legislature could apportion liability, by disallowing suit, with regard to its subordinate entities without violating the Constitution. *Id.* at 418. "[T]he municipality itself cannot complain of any act of the Legislature diminishing its revenues, amending its charter, or even dissolving it entirely." *Id.* at 419. The proposition is oft repeated:

> Counties and other municipal corporations are, of course, the creatures of the Legislature; they exist by reason of statutes enacted within the power of the Legislature, and we see no sound basis upon which a ministerial (or, for that matter, any other) office may question the laws of its being. The creature is not greater than its creator, and may not question that power which brought it into existence and set the bounds of its capacities.

Keller, 275 N.W. at 97; *see Delta Special Sch. Dist. No. 5 v. State Bd. of Educ.*, 745 F.2d 532, 533 (8th Cir. 1984). The State could eliminate water works. *McSurely*, 118 N.W. at 419. The State could require DMWW to use

well water rather than its river water. It likewise can require DMWW to bear the cost of treating the state's water if DMWW wants to use it. Just as surely, it can prevent DMWW from suing improper parties that lack power to effect any change it proposes.

The Legislature "set the bounds of [drainage districts'] capacities," *Keller*, 275 N.W. at 97, and DMWW may not properly question them:

> It is to be kept in mind that we are not now considering the complaint of a property owner. Appellee is a legislative creation which has no rights or powers other than those found in the statutes which gave and sustain its life.
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> * * *
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> Unless there is some constitutional limitation on the right, the Legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature.

Board of Trustees of Monona-Harrison Drainage Dist. No. 1 in Monona & Harrison Counties v. Board of Supervisors of Monona County, Ia., 5 N.W.2d 189, 191 (Iowa 1942).[13]

[13] DMWW suggests *Monona-Harrison* is inapplicable because ***its*** powers allegedly expanded through home rule. Br. at 63-64. The Districts are at a loss to understand how the parameters of DMWW's existence under one statute alter the parameters of drainage districts' limited existence under another or the relevance of this argument in any other way.

2. The Fact DMWW Chose To Sue Entities The Legislature Created To Effectuate Its Will Rather Than The State Does Not Affect The Outcome.

DMWW argues, because it chose to sue subordinate entities without power to address its concerns rather than the state, it somehow escapes limitations on the creature's ability to sue the creator. DMWW is mistaken. The "legislature has 'sharply restrict[ed] the circumstances in which the affairs of a drainage district are subject to judicial action.'" *Chicago Cent.*, 816 N.W.2d at 374. Drainage districts "have only such powers as the statutes provide." *Fisher*, 369 N.W.2d at 429; *Board of Trustees of Monona-Harrison Drainage Dist. No. 1*, 5 N.W.2d at 191 ("Appellee is a legislative creation which has no rights or powers other than those found in the statutes which gave and sustain its life."). Thus, challenging drainage districts' conduct ***is*** challenging the state:

> The Authority's challenge of the city's action is, if only indirectly, a challenge to the legislature's grant of authority to the city to determine whether a housing authority may operate within its boundaries. It is this grant of authority by the state legislature that allowed the city to both prohibit the Kaw Housing Authority from carrying out its contracts for the purchase of seven homes within its boundaries and to obtain a permanent injunction prohibiting the Authority from purchasing any other home in the city. Since the city complied with the state legislature's prescription, its actions are sanctioned by the legislature. The Authority, as a state agency, cannot therefore void the city's actions based on an assertion of a constitutional right inherent in the agency.

Housing Auth. of Raw. Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183, 1189-90 (10th Cir. 1991); *see Village of Arlington Heights v. Reg'l Transp. Auth.*, 653 F.2d 1149, 1153 (7th Cir. 1981) ("Further, under the Illinois Constitution, the RTA may exercise 'only powers granted by law,' Illinois Const., art. VII, s 8; therefore, any claim that an RTA ordinance enacted pursuant to a state statute is unconstitutional necessarily includes a claim that the authorizing statute is unconstitutional."). "[T]he courts have held time and again that the exercise of power under such delegation as this is in such sense a legislative act . . . ." *Maben*, 175 N.W. at 514.

Beyond the fact DMWW *does* challenge the State's "legislative act," there also is overwhelming authority that two subordinate entities may not sue each other claiming the state improperly allocated their respective rights. "[T]he principle that a municipality may not challenge acts of the state under the Fourteenth Amendment applies 'whether the defendant is the state itself or another of the state's political subdivisions.'" *Village of Arlington Heights*, 653 F.2d at 1153 (quoting *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980)); *see City of Ponca City*, 952 F.2d at 1189-90 ("We thus conclude that a political subdivision of a state may not challenge the validity of an act by a fellow

political subdivision under the Fourteenth Amendment unless such an action is expressly authorized by the creating state."); *S. Macomb Disposal Auth.*, 790 F.2d at 505 ("For the same reasons, a political subdivision of a state cannot challenge the constitutionality of another political subdivision's ordinance on due process and equal protection grounds."); *City of S. Lake Tahoe*, 625 F.2d at 233-34 ("This is true whether the defendant is the state itself or another of the state's political subdivisions."); *Kleinwood Mun. Util. Dist. v. Cypress Forest Pub. Util. Dist.*, 2009 WL 890270, at *3 (S.D. Tex. Mar. 30, 2009) ("one government subdivision may not pursue constitutional claims against another, whether through pure constitutional claims or through the statutory vehicle of Section 1983"), *aff'd*, 332 F. App'x 989 (5th Cir. 2009); *City of Evanston v. Reg'l Transp. Auth.*, 559 N.E.2d 899, 907 (Ill. App. Ct. 1990) ("The reasoning that political subdivisions have only those rights which are conferred on them by the state applies logically to challenges brought under the United States Constitution by political subdivisions not only to state statutes or other state action but to the action of other political subdivisions.").[14]

[14] DMWW cites several cases to claim Iowa permits suits between political subdivisions. DMWW misses the point. The Districts do ***not*** claim governmentally created entities may never sue each other. The point is more refined – a State created entity cannot be heard to complain the State

3. DMWW's Claim That Its Allegedly "Proprietary" Nature Allows It To Override Legislative Policy Is Neither Accurate Nor Relevant.

DMWW next argues it may re-strike the balance the Legislature struck between its creations because DMWW performs "proprietary" functions. Putting aside that delivering water to citizenry is better regarded as governmental than "proprietary,"[15] DMWW overlooks that the distinction

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unfairly apportioned its rights vis a vis another State created entity. DMWW cites no cases addressing this issue or challenging how a state apportioned rights vis a vis two governmentally created entities. *City of Akron v. Akron Westfield Cmty. Sch. Dist.*, 659 N.W.2d 223 (Iowa 2003) (involving a contract dispute between a school district and city regarding payment for electricity); *City of West Branch v. Miller*, 546 N.W.2d 598 (Iowa 1996) (involving a claim by city that assessor and auditor failed to correctly assess and collect taxes); *City of Ames v. Story County*, 392 N.W.2d 145 (Iowa 1986) (involving a dispute regarding construction permits). *City of Coralville v. Iowa Utilities Bd.*, 750 N.W.2d 523 (Iowa 2008), does not appear to address the issue at all. Cases not addressing an issue, or in which the issue was not raised, cannot properly be cited as addressing, let alone deciding, an issue. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("A prior decision is not a binding precedent on a point not raised in briefs or arguments nor discussed in the Court's opinion."). Further, the constitutional claim in *City of Coralville* was found to be without merit. *Id.* at 531. Similarly, DMWW cites *Board of Supervisors of Pottawattamie County v. Board of Supervisors of Harrison County*, 241 N.W. 14 (Iowa 1932), seeking to show Iowa has adjudicated constitutional questions between drainage districts and boards of supervisors. Not only was the case in mandamus, but the constitutional claim was rejected. As hard as DMWW might try to fit a square peg in a round hole, Iowa simply does not allow the suit it wishes to bring.

[15] "A municipality exercising its power to furnish water is acting in its legislative and governmental capacity." *Maribu v. Nohowec*, 293 N.Y.S.

between proprietary and governmental functions long has been rejected as "untenable." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 542 (1985) ("It was this uncertainty and instability that led the Court shortly thereafter, in *New York v. United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946), unanimously to conclude that the distinction between 'governmental' and 'proprietary' functions was 'untenable' and must be abandoned."); *McCallum v. City of Athens, Ga.*, 976 F.2d 649, 653 n.7 (11th Cir. 1992); *Metro. Dev. & Hous. Agency v. S. Cent. Bell Tel. Co.*, 562 S.W.2d 438, 444 (Tenn. Ct. App. 1977) ("the concept that a state-created agency may invoke the contract clause against the State in regard to matters involving the agency on its 'proprietary' capacity appears to have been abandoned by the U. S. Supreme Court."); *see City of Ames*, 392 N.W.2d at 147-49 (noting "sharp criticism" and "shortcomings" of governmental-proprietary zoning distinction). Even when recognized as a possible argument, DMWW's position uniformly was rejected. *Board of Levee Comm'rs of the Orleans Levee Bd. v. Huls*, 852 F.2d 140, 142-43 (5th Cir. 1988) ("The Board is correct that prior Supreme Court cases have spoken of the possibility that the 'proprietary rights' of a state subdivision may be

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457, 463 (N.Y. App. Div. 1937); *see Brush v. Comm'r*, 300 U.S. 352, 370-373 (1937) (holding delivery of water is a governmental function).

entitled to constitutional protection. *** But each of these cases held that such a right did not exist in that particular case.").[16]

Even more fundamentally, however, when the governmental/proprietary distinction retained greater vitality, it still did *not* apply in this context because **"[t]he power to determine the conditions upon which waters may be so diverted is a legislative function. The state may grant or withhold the privilege as it sees fit."** *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185 (1923) (emphasis added). "The distinction sometimes noted in the books between the operations of a municipality in what is there called its governmental capacity and its operations in its proprietary capacity is not material in such a case as this" involving water. *McKenzie v. Wilson*, 31 Haw. 216, 238-39 (1930). "That the cities are operating their water systems in a proprietary rather than governmental capacity . . . does not provide them with standing to invoke the Fourteenth Amendment." *City of Colorado Springs v. Bd. of County*

[16] Reflecting this doctrine's fading vitality, even cases DMWW cites ultimately adopt *the Districts*' position. *See Scott County v. Johnson*, 222 N.W. 378, 381 (Iowa 1928) (noting a political subdivision having a dual capacity of both public and proprietary functions is "exceptional rather than usual" and holding no proprietary rights were involved because plaintiff's property was acquired by exercise of governmental functions).

Comm'rs of County of Eagle, 895 P.2d 1105, 1119-20 (Colo. Ct. App. 1994).

"Such corporations being mere creatures of the state, their powers may be enlarged, modified, or diminished by the state without their consent, and the distinction between a municipality as an agent of the state for governmental purposes, and as an organization to administer local needs in a business or proprietary capacity, afford no ground for the application of the contract or due process clauses of the federal Constitution against a state in favor of its own municipalities." *City of Tulsa v. Oklahoma Natural Gas Co.*, 4 F.2d 399, 403 (E.D. Okla. 1925); *see Inc. City of Humboldt v. Knight*, 120 N.W.2d 457, 459-60 (Iowa 1963) ("it matters not whether this function be classified as proprietary or governmental, the legislature clearly restrained the means and method of exercising the powers conferred, and that in attempting to contract or barter water service to Johnston, the Humboldt town council exceeded its powers and the contract was ultra vires.").

The point is simple. The state, not DMWW, gets to apportion rights to water from its waterways. Iowa Code § 455B.262(3) ("control and development and use of water for all beneficial purposes is vested in the state...."). This is an inherently legislative function for the state and the City

of Des Moines' Water Works may not override that legislative control. *City of Trenton*, 262 U.S. at 185.

IV. As A Matter Of Iowa Law, Does The Plaintiff Have A Property Interest That May Be The Subject Of A Claim Under The Iowa Constitution's Takings Clause As Alleged In The Complaint?

DMWW also argues it has a property interest in the state's water and, apparently, it is a "taking" if it draws water not meeting the federal standard for drinking water:

> DMWW has two protectable property interests that Drainage Districts are impairing: (A) DMWW's right to obtain clean water from the Raccoon River, and (B) DMWW's ability to use its treatment plant and facilities free of the dangerous levels of nitrate that the Drainage Districts discharge into the Raccoon River.

Br. at 70-71. Under this theory, DMWW presumably could sue the state for diminishing its property value by not delivering tap-ready water to its doorstep. DMWW appears to continue its misimpression that this suit involves whether it has *any remedy against anyone.* Again, this suit only involves whether DMWW can sue improper parties that have no independent existence beyond doing what the Legislature provided demanding they prevent something they have no authority to prevent. The question is whether it is a "taking" to insist a proper party with power to act be sued, rather than an improper party.

A. DMWW Does Not Own The State's Water Rights.

DMWW's takings claim fares no better than its due process and equal protection claims. Simply put, it is not DMWW's water. Article I, § 18 of

Iowa Constitution precludes taking "***private property***" for public use without just compensation. Iowa Const. art. I, § 18 ("Private property shall not be taken for public use without just compensation first being made . . . ."). The property at issue is water in the Raccoon River. The Raccoon River is a public waterway, not private property. *See Delaware County Safe Drinking Water Coalition, Inc. v. McGinty*, No. 07-17822008 WL 2229269, at *1 n.1 (E.D. Penn. May 27, 2008) ("This case involves public water supplies, not private property. There can be no taking of a public resource[.]"). "Upon admission to the Union, a state holds title in its sovereign capacity to the bed of any navigable river or stream within its borders." *State ex rel. Iowa Dep't of Nat. Res. v. Burlington Basket Co.*, 651 N.W.2d 29, 31 (Iowa 2002); *see* Iowa Code § 455B.262(3) ("control and development and use of water for all beneficial purposes is vested in the state....").

The state controls use of its waterways. Indeed, it can condition use of its water on seeking a permit. Iowa Code section 455B.267 et. seq. (2016) (noting the state "may" issue permits to use its water). Asserting that one has "riparian rights" does not alter the outcome because the state's riparian rights are superior. As has been made clear, "the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704, (1987); *Ancarrow v. City of Richmond*, 600 F.2d 443, 446 (4th Cir. 1979) (rejecting takings claim

based on alleged pollution of water); *In re Tennessee Valley Auth. Ash Spill Litig.*, 805 F. Supp. 2d 468, 493-94 (E.D. Tenn. 2011) (same). "Exercise of the servitude did nothing more than realize a limitation always inherent in the landowners' title. It was not a taking." *United States v. 30.54 Acres of Land, More or Less, Situated in Greene County, Com. of Pa.*, 90 F.3d 790, 795 (3d Cir. 1996); *Borough of Ford City v. United States*, 345 F.2d 645, 647 (3d Cir. 1965) ("the navigational servitude of the Federal Government allows it to take private property without compensation when it is controlling and regulating navigable waters in the interest of commerce"). Iowa's Supreme Court opted to follow the same rule for its own waterways. *Peck v. Alfred Olsen Const. Co.*, 245 N.W. 131, 135 (Iowa 1932) ("the state must have taken a like right").

In controlling water use, Iowa's Legislature merely controls what it has every right to control. *City of Trenton*, 262 U.S. 182, was, in fact, a takings case and "controls our decision. The Board cannot sue the state for an uncompensated taking of property." *Board of Levee Comm'rs of the Orleans Levee Bd.*, 852 F.2d at 142; *Maribu*, 293 N.Y.S. at 463 ("The question of water supply is a matter of state-wide concern over which the Legislature has full control."). "That property used in a system of water works and the powers granted in connection therewith may, as freely as other property and powers, be withdrawn from the jurisdiction of the municipality is specifically held in *Trenton* v. *New Jersey*, *supra.*" *McKenzie*, 31 Haw. at 238-39. "None of those cases, or any case that we

could discover, ever found that a political subdivision properly asserted its constitutional rights to just compensation against its state." *Board of Levee Comm'rs of the Orleans Levee Bd.*, 852 F.2d at 143. DMWW cites no cases to the contrary.

Just as here, in *City of Trenton*, the city claimed its water works was "proprietary" and, thus, the state's actions in regulating it constituted a taking under the Constitution. The U.S. Supreme Court rejected DMWW's argument:

> The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations.
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> **But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey.** They do not apply as against the state in favor of its own municipalities. We hold that the city cannot invoke these provisions of the federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. In view of former opinions of this court, no substantial federal question is presented.

City of Trenton, 262 U.S. at 191-92 (emphasis added); *see also Peck. Co.*, 245 N.W. 135-36 (holding Iowa would assume the same rights as the federal government as to water in its waterways). The state enjoys an absolute right to apportion rights to "diversion of water." *Id.*; *see* Iowa Code § 455B.266

(2016). Any claim that apportioning those rights is a taking, or otherwise violates the Constitution, improperly intrudes on the state's rights and must fail. "The diversion of waters from the sources of supply for the use of the inhabitants of the state is a proper and legitimate function of the state." 262 U.S. at 186.

B. DMWW's Claim That Iowa's Constitution Expressly Makes Water Works Liable For Its Takings Claim Is Meritless.

Ignoring that the state controlling use of its own property is not a taking, DMWW suggests including the provision allowing drainage districts in Iowa Constitution Article I, Section 18, pertaining to eminent domain, somehow means drainage districts are liable to DMWW for takings. To get there, DMWW first must ignore that *no private property is taken*. Even then, however, DMWW has it backward. The clause addressing drainage districts *does* appear in Article I, Section 18, but DMWW overlooks inclusion of the word, "however" in the section addressing drainage districts. Iowa Const. art. I, § 18 ("Private property shall not be taken for public use without just compensation . . . . * * * The general assembly, however, may pass laws permitting ... drainage districts ...."). "However" is used to introduce a statement that contrasts with or seems to contradict something that has been said previously. *See Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008); *Kist v. Butts*, 1 N.W.2d 612, 613 (N.D. 1942). This Court

already rejected DMWW's argument that this clause requires eminent domain payments to those downstream:

> If the Constitution of the state expressly empowered boards of supervisors to do certain things with reference to drainage products, and expressly stated that these things might be done no matter what the consequences to lower lands would be, the doing of what the defendant board is doing would, whatever it might be, not lack for sanction by the Constitution.
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> So far as exercise of power violative of the Iowa Constitution is concerned, if that instrument permitted boards of supervisors to do what these defendants propose to do, **without providing any remedy for lower landowners or any compensation for them**, the act of the board would still not be violative of the Iowa Constitution.

Maben, 175 N.W. at 513-14 (emphasis added). Only when a drainage district takes land for its own uses must it engage in eminent domain. What the Constitution permits does not violate the Constitution.

C. Even If A Taking Could Be Found, The Proper Recourse Still Is A Mandamus Action.

Finally, even if a taking could be found in the State controlling use of its own asset, the proper response ***still*** is mandamus. *Phelps v. Board of Supervisors of Muscatine County*, 211 N.W.2d 274, 276 (Iowa 1973) ("We have held on a number of occasions that mandamus is a proper remedy to compel condemnation when there has been a taking of private property for public use without just compensation."); *Hagenson v. United Tel. Co. of*

Iowa, 164 N.W.2d 853, 856 (Iowa 1969) ("There can be no doubt as to plaintiff's right, by mandamus, to compel proceedings in eminent domain where, as here, it appears there is an asserted taking of private property for public use without just compensation."); *Harrison-Pottawattamie Drainage Dist. No. 1 v. State*, 156 N.W.2d 835, 839 (1968) ("[M]andamus will lie to compel institution of condemnation proceedings where there has been a taking of private property for public use without compensating the owner.").[17]

CONCLUSION

For all the foregoing reasons, should the Court deem it appropriate to answer the questions the Federal District Court for Iowa's Northern District certified, they should be answered that (1) a "drainage district could not be subject to a money judgment in tort under any state of facts." *Fisher*, 369 N.W.2d at 430, (2) "mandamus [i]s the appropriate remedy for board inaction," *Chicago Cent.*, 816 N.W.2d at 374, (3) the Legislature's creation of limited existence for drainage districts does not violate any constitutional provision, *Gard*, 521 N.W.2d at 699, and (4) it is not a taking for the

[17] Ultimately, this is all a tempest in a teapot. Even if a taking claim were permitted, it would have had to be brought within five years. *K & W Elec., Inc. v. State*, 712 N.W.2d 107, 115 (Iowa 2006); *Scott v. City of Sioux City*, 432 N.W.2d 144, 147 (Iowa 1988). Here, the drainage districts have existed for decades.

legislature to control use of its own asset as between two of its subordinate entities. *City of Trenton*, 262 U.S. at 191-92; *Maben*, 175 N.W. at 513-14.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument upon submission of this appeal should the Court deem oral argument necessary.

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on March 28, 2016, I electronically filed the foregoing Appellees' Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document on the following for purposes of the Iowa Court Rules.

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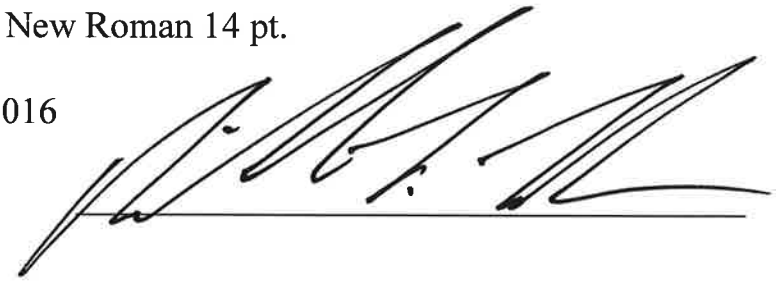
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This Final Brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this Page Proof Brief contains 12,894 words, excluding the parts of the Brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This Final Brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this Page Proof Brief has been prepared in a proportionally-spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: March 28, 2016



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